Taylor Warehouse Corporation *and* Robert Wesley Jensen and Truck Drivers, Chauffeurs and Helpers, Local Union 100, an affiliate of the International Brotherhood of Teamsters, AFL–CIO. Cases 9–CA–29151 and 9–CA–29274

July 27, 1994

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS DEVANEY AND BROWNING

On July 14, 1993, Administrative Law Judge Arline Pacht issued the attached decision. The Respondent and the General Counsel filed exceptions and supporting briefs. The Respondent filed an answering brief to the General Counsel's exception; the Charging Party filed a brief in opposition to the Respondent's exceptions; and the Respondent filed a reply brief in response to the Charging Party's brief in opposition.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record[1] in light of the exceptions and briefs and has decided to affirm the judge's rulings,[2] findings,[3] and conclusions[4] and to adopt the recommended Order as modified.

1. The judge found, and we agree, that the Respondent transferred bargaining unit work to nonunit employees in violation of Section 8(a)(5), (3), and (1) of the Act.[5] However, the judge limited her backpay remedy to the three employees laid off as a result of the unlawful diversion of bargaining unit work. The General Counsel has excepted to the judge's failure to provide a backpay remedy for all bargaining unit employees who lost earnings as a result of the Respondent's unlawful transfer of bargaining unit work. We find merit in this exception because we agree with the General Counsel that the record shows that additional bargaining unit employees were adversely affected by the transfer of bargaining unit work. Accordingly, we shall modify the judge's recommended Order and substitute a new notice to require that the Respondent, inter alia, make whole all unit employees for any loss of earnings they may have suffered as a result of the diversion of unit work. We leave to the compliance stage of this proceeding the determination of the amount of earnings lost and the identity of the employees entitled to an award.[6]

2. The judge also found, and we agree, that the Respondent unlawfully insisted to impasse on its unit scope proposal, a permissive subject of bargaining. In this connection, the judge admitted and credited the testimony of Union Business Agent Gibson that he did not agree to the Respondent's scope proposal as written. Gibson testified that he initialed the Respondent's proposal in January 1992, but he did so only with the understanding that the Respondent would delete certain underlined language making reference to Taylor Distributing employees' right to perform specific work. He further testified that when he discovered at the next bargaining session that the underlined language had not been deleted he notified the Respondent that there was no agreement on that provision.

The Respondent argues that such testimony should not have been admitted or relied on because extrinsic evidence concerning the intent of the parties to a contract is irrelevant when the written language of the agreement is clear. Here, the Respondent argues, the Union initialed a written proposal containing clear and unambiguous language. Thus, the Union should be held to its agreement, and the judge should not have admitted Gibson's testimony.

[1] In its review of this case, the Board found that G.C. Exhs. 1(a)–(w), which were identified and offered into evidence at the hearing on June 8, 1992, were never received into evidence and were not transmitted to the Board. On November 23, 1993, the Board issued a Notice to Show Cause why certain documents contained in the Board's formal case file should not be received into evidence. The notice also provided the parties an opportunity to stipulate that other documents from G.C. Exhs. 1(a)–(w) should be admitted into evidence. The only response received by the Board was the Charging Parties' request that the record contain the formal charges. Accordingly, the Board will receive into evidence the following documents contained in the Board's formal case file: the charge in Case 9–CA–29151 filed December 13, 1991; the charge in Case 9–CA–29274 filed January 28, 1992; the amended charge in Case 9–CA–29274 filed January 30, 1992; the order consolidating cases, consolidated complaint and notice of hearing dated March 10, 1992; and the second amended answer to consolidated complaint filed May 11, 1992.

[2] The Respondent has excepted to the judge's failure to rule on its motions to correct the transcript, which were unopposed. The Respondent's motions are granted, except that the transcript index should show that R. Exhs. 117 and 118 were ''received'' at p. 908 rather than at p. 154.

[3] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[4] We do not rely on the judge's conclusion (sec. II,F,2, par. 7, and sec. III,A,1, par. 4) that the Respondent must have perceived merit in Douglas Feltman's grievance because it paid him $400 in settlement.

[5] We note that at one point in her decision (sec. III,A,2, par. 5) the judge stated that the Respondent violated Sec. 8(a)(5) and (1) of the Act by unilaterally transferring bargaining unit work to nonunit employees ''without the Union's consent.'' Because there was no collective-bargaining agreement in effect at that time, the Union's actual consent was not necessary. However, by transferring the work without bargaining in good faith with the Union, the Respondent violated Sec. 8(a)(5) and (1).

[6] We shall also modify par. 2(a) of the judge's recommended Order and substitute a new notice provision to conform to the Board's standard reinstatement language.

We disagree with the Respondent. Under Board law, tentative agreements made during the course of contract negotiations are not final and binding.[7] Thus, because the Union's initialing of the Respondent's scope proposal did not result in a binding agreement, it was proper for the judge to consider Gibson's testimony concerning his intent.

The judge credited Gibson's testimony that, although he initialed the Respondent's scope proposal, he meant to strike, not accept, the underlined language. The judge found that union negotiators retracted their assent at the next meeting when they found that the controversial language had not been deleted. Thus, at that meeting it was clear to the Respondent's negotiators that there was no true agreement on the scope proposal. In light of this lack of agreement between the parties, the Respondent was not entitled to insist on its scope proposal. Accordingly, for these reasons we find no merit in the Respondent's contentions, and we agree with the judge that by bargaining to impasse on the inclusion of its scope proposal, a permissive subject of bargaining, the Respondent violated Section 8(a)(5) and (1) of the Act.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Taylor Warehouse Corporation, Cincinnati, Ohio, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2(a).

''(a) If it has not already done so, offer Kevin Cole, Jeffrey Feucht, and Robert Wesley Jensen immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and make them whole for any loss of earnings and other benefits suffered as a result of their unlawful layoffs, in the manner set forth in the remedy section of the decision.''

2. Insert the following as paragraph 2(b) and reletter the subsequent paragraphs.

''(b) Revoke the termination of pool assignments, restore such work to bargaining unit employees, and make whole all unit employees who at the compliance stage of this proceeding are determined to have lost earnings and other benefits as a result of the Respondent's unlawful transfer of bargaining unit work. Backpay shall be computed in accordance with *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).''

3. Substitute the attached notice for that of the administrative law judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain collectively in good faith about rates of pay, wages, hours, and other terms and conditions of employment with Truck Drivers, Chauffeurs and Helpers, Local Union 100, an affiliate of the International Brotherhood of Teamsters, AFL–CIO, as the exclusive bargaining representative of our employees in the following appropriate unit:

> A. All of our receiving employees engaged in handling, loading or unloading of warehouse freight or warehouse merchandise on the docks or premises of Taylor Warehouse Corporation excluding Taylor Ordering employees, office employees, watchmen, engineers, carpenters and supervisors within the meaning of the Act.
>
> B. All of our ordering and general warehouse employees engaged in handling, loading or unloading of warehouse freight or warehouse merchandise on the docks or premises of Taylor Warehouse Corporation, except office employees, watchmen, receiving employees, engineers, carpenters and supervisors within the meaning of the Act.

WE WILL NOT unilaterally change wages, hours, and other terms and conditions of employment of our bargaining unit employees or divert Taylor Warehouse Corporation bargaining unit work to employees of Taylor Distributing Company or to any other of our facilities without obtaining the consent of or bargaining in good faith with the Union.

WE WILL NOT lay off or discharge employees or otherwise cause them to lose earnings as a result of our unlawful transfer or diversion of bargaining unit work to nonunit employees.

WE WILL NOT threaten to sell the Sharon Road facility to coerce the Union into accepting our collective-bargaining proposals.

WE WILL NOT threaten employees with dismissal or other reprisals because they may testify adversely to us in legal proceedings.

[7] See *Stroehmann Bakeries*, 289 NLRB 1523, 1524 (1988) (because there is so much give and take in the course of negotiations, there is usually no binding agreement until a final complete agreement is reached).

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer Kevin Cole, Jeffrey Feucht, and Robert Wesley Jensen immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, if we have not already done so, and WE WILL make them whole for any loss of pay or other benefits that they may have suffered as a result of our unlawful action against them after July 28, 1991.

WE WILL revoke the termination of pool assignments, restore such work to bargaining unit employees, and make whole all bargaining unit employees who have lost earnings as a result of our unlawful action after July 28, 1991.

WE WILL, on request, bargain collectively in good faith with Truck Drivers, Chauffeurs and Helpers, Local Union 100, an affiliate of the International Brotherhood of Teamsters, AFL–CIO, as the duly authorized bargaining representative of the ordering and receiving employees in the bargaining unit described above, and if agreement is reached, execute a signed written agreement.

TAYLOR WAREHOUSE CORPORATION

James E. Horner, Esq., for the General Counsel.
Roger A. Weber, Esq. (Taft, Stettinius & Hollister), of Cincinnati, Ohio, for the Respondent.
Barbara Harvey, Esq., of Detroit, Michigan, for the Charging Party.

DECISION

STATEMENT OF THE CASE

ARLINE PACHT, Administrative Law Judge. On charges filed by Robert Wesley Jensen on December 13, 1991, and by the Truck Drivers, Chauffeurs and Helpers, Local Union 100, a/w the International Brotherhood of Teamsters, AFL–CIO, on January 29, 1992, as amended 1 day later, a complaint and notice of hearing issued in Case 9–CA–29151–1 on January 30, 1992, alleging that Taylor Warehouse Corporation (the Respondent) has been engaging in unfair labor practices as set forth in the National Labor Relations Act (the Act). Thereafter, on March 10, 1992, a consolidated complaint issued alleging, inter alia, that Respondent violated Section 8(a)(1), (3), and (5) of the Act. The Respondent filed timely answers denying that it had engaged in unlawful activity.

This case was tried in Cincinnati, Ohio, on June 8–11 and July 28–30, 1992, at which time the parties had full opportunity to call and examine witnesses, introduce documentary proof, and argue orally. On the entire record in this case, including posttrial briefs filed by counsel for the General Counsel (the General Counsel), the Charging Party Union, and Respondent, I make the following[1]

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent, Taylor Warehouse Corporation, has engaged in warehousing merchandise and Taylor Distributing Company has engaged in the interstate transportation of freight at the corporation's facility on East Sharon Road in Cincinnati, Ohio.[2] During the past 12 months, Taylor Warehouse admits that it has derived gross revenues in excess of $50,000 for the warehousing of merchandise in interstate commerce under arrangements with various common carriers, including Taylor Distributing Corporation, which operate between various States in the United States. During the same time period, Taylor Distributing admits it has derived gross revenues in excess of $50,000 for the transportation of freight from Ohio directly to points outside the State. Accordingly, the consolidated complaint alleges, Respondent admits, and I find that Taylor Warehouse and Taylor Distributing are engaged in interstate commerce within the meaning of Section 2(2), (6), and (7) of the Act.

At all material times, the Union has been a labor organization with the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *The Issues*

This case presents the following issues:

(1) Whether Respondent has transferred bargaining unit work to nonbargaining unit employees since July 28, 1991.

(2) Whether Respondent unlawfully insisted that the Union agree to amend the unit description so that certain work would be assigned expressly to excepted, nonunion employees.

(3) Whether Respondent laid off unit employees Robert Wesley Jensen, Kevin Cole, and Jeffrey Feucht because of their union membership.

(4) Whether Jack Taylor, president of Taylor Warehouse, threatened employee Jeffrey Feucht, with loss of employment on June 20, 1991, because of his union activities.

(5) Whether Respondent's president threatened to sell the Sharon Road facility and phase out its operations if the employees refused to accept proposed language regarding the scope of the bargaining unit.

(6) Whether Respondent's president unlawfully bypassed the Union and dealt directly with bargaining unit employees by discussing the Company's bargaining proposal relating to the scope of the units and the Union's refusal to accept the proposal.

[1] References to the General Counsel's exhibits will be cited as GCX followed by the appropriate exhibit number; the Charging Party Union's exhibits will be referred to as CPX; and the Respondent's exhibits as RX. Cited portions of the transcript will be referred to as TR., followed by the page number.

[2] In its answer to the consolidated complaint, Respondent denied an allegation that Taylor Warehouse and Taylor Distributing constitute a single employer within the meaning of the Act. However, at the hearing, the General Counsel and Respondents entered into a stipulation in which the companies' single-employer status was admitted for the purposes of this case.

B. *Background*

For over a century, members of the Taylor family have engaged in warehousing and trucking operations in the Cincinnati area, using various company names which changed as the principal focus of the business altered. For example, in 1962, what had been Taylor Trucking was renamed Taylor Distributing Co. to reflect the addition of warehousing functions.

In 1961, Taylor Trucking and the Union entered into the National Master Freight Agreement covering the Company's drivers. However, sometime in the mid-1960s, as the Company began to phase out the trucking operations, the warehouse business expanded. Accordingly, in recognition of this shift, in 1964, Taylor Distributing executed the first of a series of warehousing agreements with Local 100. At this time, Jack Taylor asked the Company's most senior driver, David Brown, to transfer to the warehouse union, assuring him he would retain his seniority and existing pension benefits. Brown accepted the proposal, which was put into writing and signed by him and Taylor. Notwithstanding this commitment, Taylor subsequently discontinued Brown's NMFA pension and denied him raises until other employees under the Local warehouse agreement reached his rate of pay.

In 1972, Taylor Distributing (TD) moved to its present location on East Sharon Road.[3] Five warehousemen, including Brown, transferred to that site where they became employees of a newly formed entity, Taylor Warehouse (TW). From 1972 until sometime in the mid-1980s, TW unit employees were wholly responsible for moving all merchandise that entered and left the warehouse, whether it was categorized as ''warehouse'' or ''pool'' freight.

Some years later, over the protests of the TW workers, the Respondent claimed that pool freight operations were the exclusive preserve of a group of nonunit TD employees who shared space with TW in the Sharon Road warehouse. Because much of this case turns on the parties' competing claims as to which group of employees is responsible for handling warehouse and pool freight, it is important to understand how these terms were defined.

On the one hand, according to the Respondent, ''warehouse freight,'' refers to goods which are unsold when delivered to the warehouse. On arrival, warehouse freight is unloaded, inventoried, and stored on racks within the facility until TW receives a purchase order for a given amount of the product. TW employees fill the orders and convey them by forklift to a staging area on the dock, where they are loaded onto a truck with other items destined for the same geographic area. Pool freight, on the other hand, is a trade term applied to goods that are sold prior to their delivery to the warehouse and, therefore, are not factored into the warehouse inventory. Instead, under ideal circumstances, pool freight is unloaded, separated, and transferred to various staging areas on the dock where it is reloaded with other merchandise and delivered to the purchaser within 24 hours.

Although the Respondent suggests that sharp differences distinguish warehouse from pool freight, credible testimony revealed that the line between these categories is more blurred than bright. It is undisputed that outwardbound warehouse freight often is comingled; that is, pooled as it is loaded onto a truck with other products headed for the same geographic location. Just as frequently, pool freight is not transshipped within 24 hours. Abundant record evidence showed that some goods which admittedly was pool freight, including such products as Wrigley's Chewing Gum, remained in the warehouse for days, and occasionally, for weeks. In the final analysis, the major differences between pool and warehouse freight have more to do with matters such as paperwork and dates of sale than with the functions performed by the employees who unload, stage, and reload goods in much the same manner whether they are inventoried or pooled. Thus, I do not find warehouse and pool freight as distinct as Respondent suggests. However, I shall use those terms throughout this decision as a matter of convenience.

C. *Respondents Hire Distributors to Assist with Pool Work*

TD's trucking operations were phased out over time as employees retired, resigned, or died, so that by 1978 no union drivers remained on the payroll. Rather than replacing them with in-house drivers who would have been covered by the Master Freight Agreement, for a few years Respondent TD used independent owner-operators.

In 1982, Jack Taylor's son, Rex, joined the family business as president of Taylor Distributing, which at the time was virtually inactive. He soon began hiring drivers who worked directly for the Company, but on a nonunion basis.

Several years later, in 1984 or 1985, Rex added a new employee category, initially called ''helper,'' to the Sharon Road work force. The first group of helpers, some three or four, were classified as TD employees, but were on the TW payroll until 1987. Their duties involved separating and wrapping the pool goods, filling orders, and loading the pool freight onto TD trucks, work which previously was performed solely by the TW warehousemen. By 1987, TD employed a crew of 7 helpers and owned a fleet of 10 delivery trucks. Although initially hired to help the TW warehousemen, the helpers were not included in the bargaining unit. At some later date, the helpers were metamorphosed into distributors, the term commonly used throughout this proceeding.

Even after the helpers-distributors appeared on the scene, a number of bargaining unit employees, called as Government witnesses, testified that they continued to handle both pool and warehouse freight until some time in late summer or early fall of 1991. In other words, while the distributors were limited exclusively to pool freight operations, the TW warehousemen averred that they handled both types of merchandise.

D. *Bargaining Unit Work is Allegedly Diverted to the Distributors*

Senior warehouseman David Brown testified, for example, that before the distributors arrived he and other bargaining unit members handled all freight, warehouse and pool. He estimated that at the outset, the addition of helpers reduced the time TW employees spent on pool work by some 5 to 10 percent. Brown acknowledged, however, that the amount of pooled freight assigned to TW employees gradually waned over time as the number of distributors increased. By January

[3] Both Taylor Warehouse and Taylor Distributing lease space at the Sharon Road facility, which is separately owned by a partnership composed of the two senior Taylor brothers—Jack and David.

1991, TD employed 10 distributors. Brown testified that even with this growth, he spent a significant portion of his day loading and unloading commercial and TD trucks carrying pool goods. In fact, he estimated that 50 percent of his time was spent loading trucks with pool products.

Brown stated that it was not until mid-1991 that Respondents drew the line in the sand and confined the TW employees solely to warehouse freight.[4] He further indicated that he accrued less overtime hours in the latter half of 1991 as a result of the lost pool work. Thus, he reported that during the first half of 1991, he worked 1 to 2 hours of overtime daily or 10 hours a week. In the second half of the year, he conceded that he continued to work overtime because he was the most senior employee, but he believed that on occasion his hours were ''cut down.'' (TR. 337.)

To controvert Brown's testimony, the Respondent introduced a summary of his overtime hours for each week in 1991 showing that he actually accumulated more overtime in the second half of 1991 than the first. However, on closer inspection, it is evident that most of Brown's overtime, and that of his coworkers, accrued between mid-September and early November, when TW received unusually large quantities of stock from the Keebler Company, which was anticipating a strike.[5]

Other TW employees corroborated Brown's account, alleging in substance, that they, too, spent significant periods of time handling pool freight in 1990, but experienced a decline and ultimate termination of such assignments in 1991. For example, Jack Steele, a warehouse employee since 1976, and steward since May 1990, maintained that like Brown he regularly worked with pool goods until early 1991 after which such assignments noticeably dwindled. In protest, Steele filed a grievance on February 11, 1991, accusing the Respondent of trying to phase out the Union by transferring to nonunion employees work that belonged to the TW warehousemen.

Alfred Southall, another warehouseman of longstanding, maintained that he handled pooled freight from the start of his employment until June 1991. Douglas Feltman, a TW employee since 1986, also stated that he regularly handled pool freight until mid-1991, notwithstanding the Taylors' claims that such work belonged to TD.[6]

Jeff Feucht, a more recent employee, confirmed Feltman's testimony, stating that he, too, noticed in the summer of 1991, that pool work on such pool accounts as Wrigley, Hershey, Colgate, Leaf, Sun Brands, and Brachs were shifted to the distributors. After new distributors were added to the payroll in October 1991, he believed that his working hours declined. He also stated that he could not recall working any overtime in the second half of 1991.

Wes Jensen maintained that from the time he was hired in 1989, he spent approximately 50 percent of his workday handling pool freight and continued to do so until September 1991. Stating that he worked an hour or more every day during the first half of 1991, he claimed that he ''stopped working overtime completely'' in the second half. (TR. 84–85.) Kevin Cole, another relatively new employee, testified that as the number of distributors grew in the fall of 1991, the pool work the TW employees had performed declined. Like Feucht, he stated that he worked fewer hours in late fall of 1991, until he, too, was laid off on December 13.

Paul Harris, a bargaining unit employee who testified on behalf of the Respondent, indicated on direct examination that since his arrival at the Sharon Road facility in the mid-1980s, the distributors always handled the pool freight; that is, they unloaded, separated, and reloaded all pool freight. However, on cross-examination, he admitted that his union coworkers also had had handled pool merchandise during the past 2 years, and retained sole responsibility for all Hormel Meat operations, admittedly a pool account. Keith Swensen, another unit employee, testified to the same effect. On direct examination, both witnesses gave generalized answers which supported their employer's contention that all pool freight always belonged to the TD workers. When asked specific questions about particular products on cross-examination, it became evident that the assignment of warehouse and pool work to both TW and TD employees was far from clearcut.

Although the record leaves much to be desired, I find the testimony of the Government's witnesses more consistent and reliable as to the diversion of pool freight throughout 1991 than were the accounts of the Respondent's witnesses. According to the credited statements of the warehousemen, prior to 1985, bargaining unit employees handled all freight, warehouse and pool, and performed all unloading and loading. They continued to handle pool assignments over the years, although their share of it declined, until sometime in the fall of 1991, when it ceased altogether.

On December 13, 1991, Respondent laid off Jensen, Feucht, and Cole, citing lack of work. The men were recalled 4 days later, but as warehouse work continued to decline, Feucht and Cole soon were laid off indefinitely. Jenson continued to work on less than a full-time basis and, at his request, was laid off in February 1992. He and Feucht were recalled in June 1992, and still were employed by Respondent at the time of the instant proceeding.

The General Counsel and the Charging Party contend, and the Respondent denies, that the Taylors deliberately withdrew all pool assignments from the TW warehousemen, thereby reducing their working hours, to penalize them for having filed a complaint with the U.S. Occupational Safety and Health Administration (OSHA). The record establishes that

[4] Brown averred in his affidavit that the TW employees stopped handling pool freight soon after their contracts expired in October 1990. Obviously, his affidavit is inconsistent with his oral testimony, for he said repeatedly at trial that his coworkers handled pool freight well into 1991. Brown also stated that he worked less overtime in the latter half of 1991, when documentary proof showed this was not so. Despite these contradictions, Brown seemed to be an essentially honest man; I do not believe he was intentionally deceitful. I conclude that Brown must have meant that the pool work assigned to unit employees decreased considerably in late 1990; not that all such work halted at that time. It also is difficult to believe that Brown purposely misrepresented his overtime record. Perhaps he simply underestimated his overtime hours when he observed how much more overtime the distributors were accumulating.

[5] The strike Keebler feared never materialized. Having overstocked in the fall, Keebler drastically reduced its shipments to the warehouse in late November and December.

[6] The TW witnesses could not pinpoint when they ceased working on pool freight. For example, Feltman could say only that he last worked on Wrigley orders in the spring of 1991. With similar imprecision, he said it was ''maybe a year'' or more (prior to the June 10, 1992 date of his testimony) since he worked on the Leaf pool account. Such lapses, common to most people, make his testimony more rather than less believable.

this complaint, itemizing 24 alleged safety hazards, was signed by 10 of the unit employees and filed with OSHA early in June 1991. Shop Steward Steele stated that soon after the complaint was filed he handed a copy of it to Jack Taylor, who commented: ''This isn't going to help negotiations.'' (TR. 530.)[7] Taylor suggested that Wes Jensen probably had instigated the complaint. Subsequently, Respondent transferred Jensen from the forklift he generally used to retrieve goods to a more physically taxing piece of equipment.[8] Jensen filed an individual complaint with OSHA in July, alleging that this reassignment was prompted by Respondent's desire to retaliate against him for fomenting the initial complaint. Later that month, OSHA inspected the plant and, in September, settled Jensen's complaint. In October, OSHA cited TW for 15 safety violations, and entered into a settlement agreement in which the Company pledged to correct the violations, pay penalties totaling $7900, and post a copy of the agreement.

In support of the General Counsel's and the Charging Party's retaliation theory, TW employee Brown testified that Drew Taylor made certain inculpatory remarks: namely, Drew admitted that management was disturbed by the OSHA claim and had decided ''to get tough'' so that ''all the Pool Freight . . . was going to be Taylor Distributing freight only.'' [sic] (TR. 328.)

E. *The Respondent's Business Defenses*

Company witnesses denied that any business decisions were made in reaction to the OSHA complaint. Moreover, the Taylors asserted that the distributors had jurisdictional control over all pool freight, but disagreed about the year in which such control vested. On the one hand, Drew maintained that the distributors were wholly responsible for pool work since 1987. However, his father set the date a few years later, stating that the distributors first gained a legal basis for asserting jurisdictional authority over the pool freight in 1990. He apparently was referring to the inclusion of ''warehouse'' in the collective-bargaining agreement executed in August of that year.

To discredit TW employee claims that their overtime hours were reduced when pool work was withdrawn, Respondent introduced into evidence business records which established that they did not suffer a loss of overtime in the latter part of 1991. In fact, these records showed that Brown, Southall, Steele, and Feltman, each of whom were in the first tier and guaranteed a 40-hour week, accumulated more overtime hours in the second part of 1991 than in the first.

Second-tier employees fared as well. Jensen, for example, testified that during the first half of 1991, he averaged approximately 1 hour of overtime a day, until mid-1991 when he ''stopped working overtime completely.'' (TR. 84–85.) However, Respondent's records show that Jensen worked a total of 18 hours overtime from January through May and 10.39 hours for the balance of the year. In other words, Jensen was not denied overtime in the second part of 1991 as he alleged, although it was almost half of what he earned in the first part of the year. Contrary to Cole's testimony that his overtime either decreased or ceased altogether in the fall of 1991, Respondent established that his overtime increased slightly from an average of two-thirds of an hour weekly in the first half of 1991 to 1-1/2 hours in the second half, most of which was earned from mid-September to mid-November. Feucht's overtime hours lessened somewhat in the last 6 months of the year. Company records show that he worked approximately 21 hours' overtime in the latter part of 1991, 4 hours less than the overtime worked in the first half. In December, none of the unit employees accumulated much overtime and the hours worked by the three most junior employees declined substantially.

The Company acknowledged that it did not have enough warehouse work in December to fully occupy Jensen, Cole, and Feucht. However, Respondent denied that their lack of work was causally connected with a diversion of pool work to the distributors. Instead, Respondent attributed their reduced hours to a loss of warehouse work caused by business factors beyond the Company's control.

In outlining TW's financial hardships, company officials testified that TW lost seven or eight warehouse accounts between 1990 and 1992, amounting to 35 percent of its business. Business records show that as these losses were occurring, Respondent tried to attract at least two new major warehouse clients by promising to upgrade the Sharon Road facility at considerable expense to the Company and by offering economic incentives. Respondent was unsuccessful in both instances.

In addition to losing warehouse accounts, Respondent pointed to another circumstance which produced a temporary loss of business. Anticipating a strike, the Keebler Company, TW's largest client, began to hoard great quantities of merchandise at the warehouse. In fact, between September and December 1991, Keebler doubled the number of cases that were stored in previous months. When the strike failed to materialize, Keebler had no need to augment its inventory. Consequently, it sent virtually no deliveries to the warehouse in December. As a result, warehouse work declined significantly and the least senior employees—Cole, Feucht, and Jensen—were laid off.

While TW was losing warehouse work, the pool business was booming. As a general rule, TD's pool accounts grew by approximately 30 percent each year. However, in 1991, the Company experienced a remarkable surge of such business. Beginning in April 1991, TD transferred five pool accounts from the Crescent Park to the Sharon Road facility. Further, Proctor & Gamble Paper Products began pooling freight at the Sharon plant in October. Hershey products, previously warehoused at Crescent Park, also transferred to TD as a pool account in January 1992. In addition, TD gained new pool accounts as a result of expanded operations at Respondent's warehouse in Columbus, Ohio. To handle this business, Respondent began hiring additional distributors in the summer of 1991, reaching a total of 15 by November of that year, an all time high number.

TD payroll records for 1991 track the growth of the pool trade and the parallel growth of the distributor work force. General Counsel's Exhibit 11 shows that for the first 5 months of 1991 TD employees (both distributors and drivers) averaged approximately 1500 hours of regular working hours

[7] As detailed below, the parties had bargained for a new contract since December 1990, but were stymied over the terms of the scope provision.

[8] Respondent asserts in its brief that only warehousemen use forklifts to move ware house goods. However, the record shows that distributors also relied on forklifts to transfer goods.

and 312 hours of overtime.[9] During the week of June 21, regular hours for the TD work force leaped to 1600 hours and overtime hours swelled to 632. The working hours of the TD employees never returned to the pre-June 21 levels. To the contrary, there was a steady upward climb, so that by September 6 distributors worked 1982 regular hours and 996 hours of overtime. Thereafter, the distributors' regular hours reached a plateau of 1950 hours, and then took another leap forward to 2000 hours for the week of November 8. For much of December, when work was so slow for the warehousemen that three of them were laid off, the distributors, including those recently hired, worked 40 hour weeks, plus an average of 449, 395, and 760 overtime hours in the weeks of December 13, 20, and 31, respectively.[10]

The disparity in income between the union and nonunion employees becomes even more stark when payroll data for Brown, a TW employee for almost three decades, is compared with similar data for distributors Evans and Sloan, neither of whom came close to matching his seniority. Weekly overtime (OT) and salaries for the three men is charted below.

	Brown (TW)	*Evans (TD)*	*Sloan (TD)*
Dec. 20	2.33 OT	18 OT	17 GT
	$344.00 total	$619.00 total	$633.00 total
Dec. 27	0 OT	24.9 OT	28 OT
	$316.48 total	$715.00 total	$782.00 total

The foregoing figures paint a bleak picture of the economic plight of the warehousemen in the latter part of 1991. This data tends to corroborate the warehousemen's testimony that prior to mid-1991, they handled a significant share of the pool work, but after June 1991, such work was increasingly withheld until midyear when they were foreclosed altogether from pool assignments. Certainly, there was enough work for everyone—warehousemen and distributors alike—if the unit employees had not been restricted to warehouse goods. But the Respondent curtailed the amount of work available for the unit employees by shifting all pool work to the distributors. The significant questions, which remain, are why Respondent chose to strip the warehousemen of all pool work and whether Respondent was legally justified in doing so.

Respondent contends that by inserting the word ''warehouse'' before the words ''freight'' and ''merchandise'' in the latest collective-bargaining agreements, the parties affirmed that unit employees had no authority to handle pool freight. The General Counsel and the Charging Party give no weight to the use of the word ''warehouse,'' insisting instead that the unit employees were entitled as a matter of longstanding practice and contractual right to continue handling both warehouse and pool products. In order to determine whether the Union surrendered the employees' right to handle pool goods when it entered into the 1990 labor agreement, it is necessary to turn next to the parties' bargaining history.

[9] Every distributor worked a 40-hour week in 1991, while Jenson, Cole, and Feucht worked less than 40-hour weeks for half the year. Compare GCX 11 with RX 146.

[10] Ron Hooks, hired as a distributor in August 1991, was laid off for only 1 day in December of that year.

F. *Negotiations Regarding the Contractual ''Scope'' Clause*

1. The early scope language

The parties' collective-bargaining history, especially that part of it which deals with the definition of the unit, reflects the ebb and flow in the fortunes of the warehouse business. In 1964, the parties' executed their first collective-bargaining agreement to cover TW warehouse employees. It contained the following ''Scope of the Unit'' clause:

> This agreement shall cover all employees of the Employer engaged in handling, loading or unloading of freight or merchandise on the docks or premises of the Employer and in the maintenance of such premises, excepting office employees, watchmen, chief engineer, master carpenter and other employees not properly under the jurisdiction of the Union.

With a few exceptions, this clause remained intact in successive contracts through 1987, accurately reflecting the fact that the bargaining unit employees handled all merchandise coming into and leaving the warehouse.

2. The 1987 and 1990 revisions

In the early stages of the 1987 negotiations, Respondent prevailed on the Union to accept a successor agreement in which the bargaining unit was divided into two tiers with pension benefits restricted to the first-tier senior employees. Following employee ratification of this agreement, TW hired four or five new second-tier employees.

However, the International Union's Central States Pension Fund refused to approve this two-tiered arrangement. Notwithstanding the Fund's disapproval, for the next 3 years, the Respondent adhered to the terms of the 1987 agreement, paying the employees a promised signing bonus, resolving and arbitrating grievances and contributing to the Central States Pension Fund solely for the first-tier employees. During this period, the parties attempted to resolve the problem the Fund's rejection had created. In August 1990, just a few months before the rejected contract was to expire, the parties found a creative, albeit limited solution to deal with Respondent's insistence on restricting the number of employees for whom it would make pension payments. At the suggestion of the Local's then counsel, Jonas Katz, the Union and Respondent entered into two separate agreements, effective retroactively from October 1987 to October 1990. These agreements were virtually identical except that they created two separate units. Thus, one of the agreements applied to the most senior employees who were referred to as ''receivers,'' while the other covered newer unit members called ''ordering'' employees. Only the receivers' contract offered pension and health benefits and guaranteed a 40-hour week.

At the time these two contracts were executed, the parties also agreed to a companion ''Side Letter,'' whose terms reflect an intent to treat the two units as one. Specifically, after listing the men who either were receivers or ordering employees, the side letter provided for layoffs according to seniority as if there was only one unit, prescribed when an ordering employee could advance to receiver status and created a ''vacation relief'' position, which fell into neither the receiving nor ordering category.

At an arbitration proceeding in June 1991, in which both parties relied on the two contracts and side letter as if they were valid agreements, then Union Counsel Jonas Katz offered the following undisputed explanation of the parties' intent in creating the two units:

> [T]here's a little explanation necessary—why you have two contracts and the side letter in front of you, . . . the reason being that . . . this is . . . really one agreement with a side letter attached to it establishing a two-tier system. The reason for that was because Central State Pension would not accept one agreement that did not cover all employees, so we signed two agreements. . . . The side letter is an effort to tie the two together. [CPX 84 at 5–6.]

In addition to bifurcating the unit, the scope language in each contract differed from the unit description in prior agreements in that the word ''warehouse'' was inserted before the words, ''freight'' and ''merchandise'' as follows:

> This Agreement shall cover all ordering (and receiving) . . . employees of the Employer engaged in handling, loading or unloading of *warehouse* freight or *warehouse* merchandise on the docks or premises of the employer. [Emphasis added.] [RXs 3 and 4.]

Rex Taylor testified that the Company included the term ''warehouse'' in the 1990 labor agreements to identify the work which the warehouse employees performed, as distinguished from pool work which he alleged was within the distributors' exclusive jurisdiction since at least 1987. He further stated that the bargaining unit employees' auxiliary role in assisting distributors with pool freight continued into 1991. Interestingly, he added that the amount of time unionized employees spent on such tasks increased as the amount of pool merchandise coming to the warehouse expanded.

Taylor explained that the Company's interest in isolating warehouse and pool freight arose when unit employee Douglas Feltman filed a grievance in March 1990 complaining that nonunion employees were performing pool work which belonged to the TW warehousemen. Taylor testified that when the Company denied the grievance, he told the union representatives that ''distributors have jurisdiction over the pools'' even though unit employees sometime helped them. Regardless of Taylor's assertions, Respondent must have perceived merit in Feltman's grievance, for a private settlement was arranged whereby TD paid him $80 a week for 5 weeks.

Brown testified that following close on the heels of the Feltman grievance, the Respondent diverted a number of pool freight accounts on which he had worked for years to its Crescent Park warehouse. Brown sought an explanation for the shift from Drew Taylor, who allegedly admitted that his father had instructed him to transfer the work because of Feltman's grievance.

Following the August 1990 execution of the split unit contracts, the Central States Pension Fund trustees approved the arrangement as a temporary expedient, but advised the parties that they would not do so again. Thereafter, the Fund informed the parties that they would be excluded from the pension fund as of January 31, 1991, if they failed to agree on a new contract which covered ''all employees who perform essentially the same type of work.'' In November 1990, the Fund notified all participating employers that it would refuse to approve contracts which failed to cover the entire bargaining unit.

3. Bargaining for a new contract

In June 1990, months before bargaining began for a new contract, Jack Steele was elected union steward of the warehouse unit. Steele testified that soon after his election, Jack Taylor suggested to him that the employees should ''decertify and go nonunion.'' If they did, Taylor said he would raise the employees' hourly wage rate and provide a better pension plan than their present one. Steele stated that he rejected Taylor's proposal, telling his employer that he would not risk going nonunion since he ''would be the first guy you would fire.'' (TR. 527.)[11]

In December 1990, the parties began to negotiate a new contract, or contracts, to supercede the 1987–1990 expired agreements. Although the parties had more than one unresolved issue after months of bargaining, clearly, the paramount matter dividing them was the scope language.

The Union was intent on restoring the scope language which had appeared virtually unchanged in all contracts through 1987. Thus, the Union proposed a scope clause covering only one unit with no reference to receiving and ordering employees. Interestingly, the union proposals continued to include the word ''warehouse,'' indicating that the employees regarded the ''w'' word merely as a reference to the facility.

Conversely, the Respondent wanted to retain the scope language as it appeared in the recently expired agreements in order to preserve separate units, only one of which would participate in the Central States Pension Fund. Respondent adhered to its two-unit position, insisting that it was preserving the status quo, but knowing that the Fund would reject a contract which did not provide that everyone in the unit was eligible for pension benefits.[12]

In August 1991, the Respondent agreed to reinstate a single unit, but only if the contract provided for two tiers. In addition, the Company proposed the following language which, for the first time, explicitly excluded distributors from the unit and granted them complete control of the pool freight:

> This agreement shall cover all First, Second tier and General Warehousemen employees of the employer, engaged in receiving, as unloading, or assisting in unloading, handling, storing, filing, staging in areas designated by the employer and assisting in loading when requested by the employer of Warehouse freight or Warehouse merchandise . . . excepting . . . other employees not properly under the jurisdiction of the Union, such as employees of Taylor Distributing, which also rents space . . . from Sharon Road Property, to receive, unload, sort, stage, fill, handle and load its pools and pickup freight. [Union represented employees may assist in this operation when requested by the employer.] [GCX 10; RX 26.]

[11] This incident occurred beyond the statutory 10(b) period and was admitted for background purposes only.

[12] In fact, in August 1992, with no agreement in sight, the Fund severed the employees' participation in the plan.

On August 30, the unit members rejected the above-quoted scope proposal by a vote of 10 to 2. The parties continued to meet throughout the fall, but were unable to agree on the terms of a scope provision. Then, on January 22, 1992, the parties initialed a ''scope'' proposal drafted by the Respondent. Local 100 Business Agent Larry Gibson, who was negotiating his first collective-bargaining agreement, testified that he initialed this draft assuming that a sentence he had underlined, which gave the distributors the right to load warehouse freight, would be deleted.

At the next meeting a month later, the union negotiators found that the underscored words had not been deleted and retracted their assent. Company officials, claiming they were surprised by the Union's repudiation, stated that Gibson initialed the draft without expressing any reservations about the underlined language, which they maintained conformed to company practice.[13] However, I find it implausible that Gibson meant to accept rather than strike the underlined language, when it was contrary to the unit members' persistent efforts to retrieve bargaining unit work, which they claimed had been wrongfully diverted to the distributors. At the time of the instant hiring, the parties still had not reached agreement on the scope provision.

III. DISCUSSION AND CONCLUDING FINDINGS

A. *Respondent Unlawfully Transferred Bargaining Unit Work*

The complaint alleges and the General Counsel and the Charging Party contend that the Respondent transferred bargaining unit work; that is work involving pool freight, to nonunion employees since July 28, 1991, in violation of Section 8(a)(3) and (5) of the Act. The Respondent asserts that pool freight work was not within the bargaining unit's jurisdiction either by practice or contract. Further, Respondent submits that allegations addressing the allegedly wrongful assignment of pool work are barred as untimely under Section 10(b). As discussed below, I find merit in the General Counsel's and Charging Party's contentions.

1. The retaliatory transfer of pool freight operations

From the time that unit employees moved into the Sharon Road facility until mid-1991, their responsibility for handling pool freight can be described as a gradual withering away. Prior to the mid-1980s, the TW warehousemen were solely responsible for performing all tasks involved in receiving, storing, staging, and shipping out freight, whether inventoried or pooled. Then, in 1985 the Respondent hired a handful of employee helper-distributors and assigned them tasks previously performed by the TW warehousemen. This is not to say that the first group of three or four helpers supplanted the TW warehousemen. According to Brown's uncontroverted testimony, they merely lightened the warehousemen's workload. Thus, even after distributors were introduced into the workplace, the organized employees continued to be primarily responsible for pool work. Although the distributors performed the same tasks as the warehousemen and were on the TW payroll, they were not included in the unit. Why Local 100 made no effort to organize and represent them is only one of a number of mysteries that never was answered in this case.

The years from 1987 through 1990 were marked by a gradual growth of pool accounts and a small increase in the number of distributors employed to handle them. Still, the number of distributors was not so great as to radically reduce the amount of pool work handled by the unit employees. It would be fair to say that the presence of the distributors produced an erosion, not a landslide, in the amount of pool work performed by the TW warehousemen.

During this period, the TW employees began to complain about the distributors taking unit work away. For example, during collective bargaining for a new contract in 1987, the shop steward questioned the status of the distributors, only to have the Union's business agent reply that he was not interested in them.[14] The Respondent submits that the business agent's indifference to the distributors on this occasion proves that the Union acknowledged the TD workers' exclusive jurisdiction over pool freight; that it was not part of the regular work assigned to the TW warehousemen. In fact, several of the TW employees, who testified in this proceeding, admitted that the Respondent asserted as early as 1988 that pool freight ''belonged'' to the distributors. To assert such a claim does not make it so.

Contrary to their assertions, the Taylors relied on the unit employees to handle pool goods long past 1987 or 1988. If the TW warehousemen were not involved in moving pooled merchandise, then why would TW warehouseman Feltman complain in March 1990 that distributors were ''doing union work'' by filling orders for ''Leaf (and) Wrigley's,'' products which indisputably were pool accounts. Feltman's grievance apparently had merit for Respondent was willing to pay him $400 to settle the matter privately.

Respondent contends that following the Feltman grievance, the word warehouse was inserted in the scope clause to remove any lingering ambiguity about the distributors' jurisdictional control over pool freight. Even assuming that this one word could effectively defeat the warehousemen's claim to pool work, company officials themselves ignored this allegedly limiting language. Instead, they continued to assign pool work to the union employees, albeit on a declining scale, until midsummer 1991. In finding this to be so, I rely on the corroborative testimony of Southall, Brown, Feltman, and Jensen who appeared as witnesses against the Respondent while still in the Company's employ.[15]

The General Counsel and the Charging Party submit that the Respondent finally withdrew all pool work from the unit employees in mid-1991 to retaliate against them for invoking OSHA's processes. In support of this theory, Brown testified

[13] Keith Swensen, a bargaining unit employee who testified for Respondent, said that for the past 8 years, both TW and TD employees unloaded pool freight, and that he never had seen distributors load or unload warehouse freight. Thus, he contradicted Respondent's claim that its proposal entitling distributors to load warehouse freight was in accord with past practice.

[14] Business Agent Pat Eich was not called as a witness by any of the parties. His purported disinterest in representing the distributors is another unsolved mystery in this case.

[15] In resolving thorny credibility questions, the Board often attaches great weight to testimony of current employees, which is adverse to their employer's position on the premise that they are more likely to be telling the truth when their testimony may jeopardize their own interests. See, e.g., *Midwestern Mining & Reclamation*, 277 NLRB 221 fn. 1 (1985).

that Drew Taylor admitted that his father's decision to finally terminate all pool assignments to the unit employees was triggered by the OSHA complaint. While it may have been somewhat out of character for Drew to disclose his father's motives to Brown, it is not at all surprising that Jack Taylor would act in a vindictive manner. After all, this is the same Jack Taylor who reneged on his commitment to Brown and caused him to lose his pension rights, and who deceived Feucht by promising him full-time employment when he actually hired him as a vacation relief person, and then threatened to fire him should he testify against his employer. It is not hard to believe that a man who would do these acts would also divert work from a group of union employees who went public with complaints about plant safety.[16] Thus, I credit Brown's statement and find that Respondent purposefully transferred pool work from unit to nonunit employees for retaliatory reasons.[17]

The Respondent counters that the employee-witnesses' testimony should be discredited because they falsely claimed that they were deprived of all overtime after June 1991. Company business records do contradict such claims. However, the fact that the warehouse employees continued to receive overtime assignments does not mean that all of their testimony must be discarded, nor does it prove one way or the other whether they were wrongfully stripped of all pool assignments. Careful inspection of documents summarizing the unit employees' hours reveals that their overtime was calculated in a period from mid-September to mid-November. As the Respondent's witnesses acknowledged, this period coincides with the Keebler Company's decision to stockpile its products in anticipation of a strike. Hence, the unusual amount of work generated by Keebler in the fall creates a false impression of the amount of overtime which would be available to the TW warehousemen with all pool work withdrawn but otherwise normal circumstances. Put another way, the buildup of Keebler freight was a fortuitous event which temporarily masked the effects of Respondent's withdrawing all pool work from the unit employees. While the avoidance of the strike against Keebler and the loss of some warehouse accounts contributed to a reduced workload for the TW employees, Respondent's decision to deprive them of any pool work led inevitably to a severe decline in warehouse work and the predictable layoffs of Cole, Feucht, and Jensen.

Their layoffs were neither necessary nor justified; they did not happen because of circumstances beyond the Respondent's control. After the rather remarkable increase in pool freight work beginning in June 1991, there was more than ample work for all employees, warehousemen and distributors alike, even with a loss of warehouse business. Why would the Respondent decide to withhold all pool assignments from the TW employees, just when such work was expanding dramatically beyond the capacity of the distributor work force to handle it. The record supplies only one answer: the OSHA complaint was filed on June 17, initiating an investigation, the imposition of a fine, and an eventual settlement. To retaliate, the Respondent refused to permit the warehousemen to handle their fair share of pool freight and instead, unilaterally diverted it to distributors. Such conduct violates Section 8(a)(1), (3), and (5) of the Act.

[16] Of course, it also was more cost effective to assign the pool work to nonunion labor.

[17] Given Respondent's intractable bargaining position that pool freight belonged to the distributors, that the Sharon Road facility was the only warehouse in the area serving pool accounts, that the pool business was burgeoning, that pool good were taking more and more space in the warehouse, and that another, larger, more modern, nonunionized warehouse was nearby, one wonders how interested the Taylors were in expanding the only part of the family enterprise which employed an organized work force.

2. The Union did not relinquish the unit's right to handle pooled freight

Respondent contends that the Union relinquished any claim the warehousemen might have to handle pool products when it entered into the 1987–1990 collective-bargaining agreement in which the word ''warehouse'' was added to the scope clause to modify ''freight'' and ''merchandise.'' In effect, Respondent posits that the Union waived its members' asserted right to handle pool freight.

The tenets of the waiver doctrine are well established. The Board construes alleged waivers strictly; in order for contract language to effect a waiver, it must be ''clear and unmistakable.'' *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 fn. 12 (1983). Where, as here, a respondent relies on contract language to assert that a waiver has taken place so that it may unilaterally alter terms and conditions of employment, it bears the burden of producing evidence that the matter in issue was '''fully discussed' or 'consciously explored' and that the the union 'consciously yielded or clearly and unmistakably waived its interest in the matter.''' *Reece Corp*., 294 NLRB 448, 451 (1989), quoting *Park-Ohio Industries v. NLRB*, 702 F.2d 624, 628 (6th Cir. 1983); *Southern California Edison Co*., 284 NLRB 1205 (1987). As discussed below, the Respondent has not met these stringent standards.

In mounting a waiver argument, the Respondent maintains that ''warehouse freight'' applies to and defines a distinct category of goods. However, apart from the Respondent witnesses' self-serving testimony, there is no proof that these phrases were commonly used terms of art which clearly applied to and distinguished inventoried stock from pool freight, either at its own facility or in the trade generally. The record does not disclose a single reference to ''warehouse freight'' or ''warehouse merchandise'' in any exhibit. Apparently, the union negotiators, all experienced warehousemen, did not regard ''warehouse'' as anything more than a descriptive word indicating a site to which all goods were delivered, for they continued to use it in framing scope proposals designed to recapture lost pool work during the 1991 negotiations for a successor contract.

The Company's negotiators may have thought the word ''warehouse'' had a specific meaning, but Respondent presented no evidence that they communicated such views to the union representatives. What the Taylors or their attorney intended or had in mind when they inserted ''warehouse'' in the scope clause is immaterial. What is relevant is the substance of their communications with the Union. The Respondent was obliged to prove in clear and unmistakable terms that the technical meaning and effect it attached to ''warehouse freight'' at the hearing was openly and fully discussed with the union representatives during the 1990 negotiations, and that the Union consciously acquiesced to that meaning. Respondent did not meet this burden. Instead, it improperly faulted the General Counsel and the Charging Party for failing to produce witnesses who could testify about

the Union's position during negotiations, when the duty to do so rested in its hands.

Respondent's own representatives apparently did not believe that inserting the word ''warehouse'' into the prior agreements was an effective waiver. If they did, they would not have proposed that express language assigning the pool work to the distributors be added to the scope clause during negotiations for a successor agreement. Accordingly, given the dearth of evidence as to the parties' bargaining history on this matter, I conclude that the Respondent failed to prove that the Union contractually waived the unit employees' right to perform pool operations, or that the scope clause affirmatively authorized the Respondent to transfer all such work outside the unit.[18] It follows that by unilaterally transferring bargaining unit work to nonunit employees without the Union's consent, Respondent violated Section 8(a)(5) and (1) of the Act. See *Reece Corp*., supra at 452.

3. The charge regarding diverted work is not time-barred

The charge in Case 9–CA–29151–2 alleging that Respondents unlawfully diverted unit work to nonunit employees was filed on January 28, 1992. Therefore, pursuant to Section 10(b) of the Act, the statutory period of limitations began to run 6 months earlier on July 28, 1991. The Respondent argues that the Union and employees knew of the alleged wrongful act—its decision to transfer the pool work to the distributors—long before that date. Ergo, it contends that the Union's charge was untimely filed.

Section 10(b) of Act provides in pertinent part that, ''no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board.'' To prove that a charge is untimely under this section, the Respondent must show that the Charging Party received clear and unequivocal notice of the conduct alleged to be unlawful more than 6 months before the charge was filed. See *Esmark, Inc. v. NLRB*, 887 F.2d 739, 746 (7th Cir. 1989). (The court agrees with the Board that the 10(b) period runs from time employer closed plants, not when the decision to close at some uncertain future date was announced.) *A & L Underground*, 302 NLRB 467 (1991). Even if the allegedly unlawful conduct began before the start of the 10(b) period, the Act is not tolled if independent violations occurred within the 6-month period preceding the filing of the charge. See *Twin Cities Electric*, 296 NLRB 1014, 1015 (1989); *Farmingdale Iron Works*, 249 NLRB 98, 99 (1980), enfd. mem. 661 F.2d 910 (2d Cir. 1981).

In the present case, the Respondent gave mixed signals to the warehousemen regarding their responsibility for pool goods. The Taylors may have talked one way about the distributors' work, but they acted in another. Thus, members of the Taylor family began telling the unit employees in 1987 or 1988 that the pool freight belonged to the distributors. Despite such pronouncements, TW employees were assigned to pool work for substantial portions of their workday. Indeed, the warehousemen continued to handle pool freight after the 1990 collective-bargaining agreement took effect, which supposedly contained language limiting them to warehouse freight. It was not until mid-1991, sometime after the OSHA complaint was filed, that all pool assignments to the warehousemen ceased. And it was in late summer of 1991 that Drew Taylor confided in Brown that the warehousemen's days of handling pool freight were over. These conflicting signals, which persisted into the summer of 1991, offered the men anything but a clear and unequivocal message as to their Employer's ultimate intentions.

As the Respondent correctly contends, over the protests of the warehousemen, pool work was assigned to the TD distributors long before the 10(b) period began to run. However, while the warehousemen recognized that some of their pooled work was being diverted, and grieved about it on occasion, they continued to handle a considerable amount of such freight. However, in early 1991, the Respondent began to divert a greater proportion of pool assignments to the distributors, until finally, at some point in late summer, all such work was transferred to nonunit employees. Thus, there can be no doubt that this diversion of work continued during the 10(b) period. Consequently, although the diversion of work in the years prior to July 1991 may be considered for background purposes only, the Union's charge filed on January 28, 1992, was not time-barred.

In withdrawing pool work performed by the TW employees, Respondent created a situation which led to the layoffs of Cole, Feucht, and Jensen. Their layoffs were not, as Respondent claimed, solely the result of TW's financial reverses. Perhaps if Respondent had won some new warehouse accounts, sufficient work would have come into the plant to keep the three men employed. But even without new accounts, the extraordinary amount of new pool work that came to the Sharon Road facility in the latter half of 1991 could have kept everyone busy if Respondent had chosen not to divert all such work to the distributors. In unilaterally transferring all work previously performed by the warehousemen to nonunit employees to retaliate against them for bringing safety violations to OSHA's attention, Respondent violated Section 8(a)(1), (3), and (5) of the Act. Respondent also violated the Act by laying off Cole, Feucht, and Jensen,

[18] The Charging Party submits that the August 1990 collective-bargaining agreements were invalid because the unit members never ratified them as required by the Union's constitution. For the following reasons, I agree with Respondent that the contracts were valid and binding even though they were not properly ratified.

First, when the agreements were submitted to the Respondent for execution, they already were signed by the union president and business agent. Hence, pursuant to the doctrine of apparent authority, Respondent could assume rightfully that the documents were legally binding. See *Painters District Council 52 (South Central Bd.)*, 223 NLRB 748 (1976). Second, the employees, union officials, and Respondent treated the contracts as if they were valid in presenting the Linville grievance to an arbitrator. The arbitrator, in turn, resolved the grievance by construing the agreements and the companion side bar letter. At no time during the arbitration did either party question the contracts' validity. The Union's and employees' reliance on the contracts is tantamount to adoption and ratification. See *Steelworkers v. CCI Corp*., 395 F.2d 529 (10th Cir. 1968), cert. denied 393 U.S. 1019 (1969). Third, the complaint alleges and the Respondent admitted the validity of the bargaining units described in the collective-bargaining agreements. Here, too, Respondent was justified in assuming that the contracts were valid. However, the employees did not ratify the contracts by accepting the Company's contributions to the pension and health funds, because the payments were made long before the contracts were executed. *Cf. Central States Southeast & Southwest Areas Pension Fund v. Kraftco, Inc*., 799 F.2d 1098 (6th Cir. 1986).

as their lack of work was the direct byproduct of Respondent's unlawful diversion.

B. *Respondent Unlawfully Bargained About Unit Scope*

1. The parties' contentions

As detailed above, the major obstacle in negotiating a new collective-bargaining agreement was the parties' inability to agree on the terms of the scope clause.[19] Although the Respondent's negotiators eventually acquiesced to the Union's demand to include both unit descriptions in one agreement, they then insisted on including language which would effectively remove all pool work from the TW employees and allocate it exclusively to the nonunion TD distributors.

The General Counsel and the Charging Party contend that the definition of the appropriate unit is a permissive subject of bargaining; therefore, Respondent's insistence on altering the scope of the unit and treating it as a mandatory subject, constitutes bad-faith bargaining. In defense, the Respondent poses two arguments. First, the Respondent submits that its scope proposal did not purport to alter the unit description; rather it addressed the nature of the employees' work which is a mandatory subject of bargaining. The Respondent also claims that because the Charging Party offered and bargained about numerous scope proposals during negotiations, it waived the right to claim that the matter was a permissive subject of bargaining.

2. Respondent's scope proposal is a permissive subject of bargaining

Relying on *Storer Communications*, 295 NLRB 72 (1989), enfd. sub nom. *Stage Employees IATSE Local 666 v. NLRB*, 904 F.2d 47 (D.C. Cir. 1990), the Respondent contends that its proposals did not affect the scope of the bargaining unit; rather, they clarified the type of work which already was within the distributors' jurisdiction.

In certain relevant respects, the Respondent's argument is similar to that posed by the employer in *Antelope Valley Press*, 311 NLRB 459 (1993). In that case, the respondent, a newspaper publisher, bargained to impasse and then unilaterally implemented a proposal, which added new language to the recognition clause that reserved certain computerized markup work to be performed on new equipment for persons outside the bargaining unit. (Id. at 460.) Based on the parties' most recent recognition clause which covered all typographical workers performing any work beginning with the ''markup of copy'' until the paper left the presses, the General Counsel and the charging Party pressed the same argument that is raised in the instant case; i.e., that the respondent's proposal redefined the scope of the unit and was, therefore, not a mandatory subject. Id. at 460. The *Antelope Valley Press* employer also argued, as Respondent argues here, that the contract proposal was a mandatory subject of bargaining because it did not alter the scope of the unit, did not result in the loss of jobs for unit employees, and did not remove employees from the unit.

In deciding *Antelope Valley Press*, the Board recognized the tension that exists between permissive and mandatory subjects of bargaining when the unit is defined in terms of job assignments. To resolve this tension, the Board devised a new test to determine when an employer's contract proposal is lawful. First, the Board said it would ask if ''the employer insisted on a change in the unit description . . . [If so] we shall continue to find any such insistence to be unlawful, even if the unit is described in terms of work performed.'' (Id. at 461.) The Board went further:

> If the employer does not insist on changing the unit description, however, but seeks an addition to that clause that would grant it the right to transfer work out of the unit, we will find the employer acted lawfully provided that the addition does not attempt to deprive the union of the right to contend that the persons performing the work after the transfer are to be included in the unit. [Id. at 461.]

On applying this test in *Antelope Valley Press*, the Board found that the publisher's proposal retaining the language of the old contract, ''did not purport to change the unit description,'' Id. at 462. Neither did the new language entail unit exclusion, ''because the record does not indicate that the Respondent ever insisted during negotiations that the quoted language meant that employees to whom work might be assigned . . . would never be considered members of the unit.'' Id. at 462. Accordingly, the Board concluded that the company's proposal was a mandatory subject of bargaining.

The *Antelope Valley Press* test applied to the facts in the present case leads to the opposite conclusion. Although the Respondent's proposal did not alter the unit description, it

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[19] During the hearing the Charging Party moved to amend the unit descriptions set forth in the complaint by deleting the words ''warehouse'' in order to restore the historic unit as defined in all agreements prior to the one that expired in 1990. In her brief, the Charging Party recognized that no party other than the General Counsel has a right to amend a complaint. See *Sunbeam Plastics Corp.*, 144 NLRB 1010, 1011 fn. 1 (1963). However, she suggests that such a motion is permissible where, as here, the General Counsel fails to oppose it and the subject matter of the proposed amendment has been litigated.

Although the General Counsel did not oppose the Charging Party's motion at the hearing, neither did he acquiesce to it. More importantly, in his brief, he urged that an order issue recognizing the appropriateness of unit described in par. 9 of the consolidated complaint. His request is a tacit objection to the Charging Party's proposed amendment. In addition, under the Board's Rules and Regulations, Sec. 102.20, Respondent's answer to par. 9 must be deemed an admission. (Respondent denied knowledge of how the Board would rule on the unit question under Sec. 9(b). This was a denial of a question of law, not of fact. Ergo, the Respondent failed to deny the allegation specifically as the Rules require.) In light of the General Counsel's and the Respondent's positions, I conclude that the Charging Party's motion to amend should be denied.

The unit described in paragraph 9 of the consolidated complaint was derived from the unit descriptions established by the parties in their last agreements. Therefore, I conclude that those descriptions continue to be valid in all respect with the following exception. In 1990, the parties created two units solely to satisfy the Trustees of the Health and Pension Fund. The parties' true intent, revealed by the side letter and by practice, was to treat the two units as one, but with two tiers. Accordingly, I conclude that a single unit with two tiers, as described in par. 9 of the consolidated complaint, is the appropriate unit within the meaning of Sec. 9(b) of the Act.

was designed to legitimize the transfer of all pool work to employees outside the bargaining unit. Thus, the proposal was an overt exercise in unit exclusion—it was meant to strip pool work from the unit employees jurisdiction and reserve such work for distributors who were expressly excluded from the unit. Nothing could be clearer than Respondent's intent to maximize the work assigned to the distributors and ensure that they ''would never be considered members of the unit.''

To conclude, because the Respondent's bargaining proposal was designed to curtail the represented employees' jurisdiction and deny the Union the right to assert that the individuals to whom unit work was assigned were unit members, I find, under the *Antelope Valley Press* test, that the proposal was a permissive subject of bargaining. It follows that Respondent violated Section 8(a)(5) and (1) by bargaining to impasse over it.

3. The Union did not waive its right to reject Respondent's scope proposal

Having concluded that the scope proposal was a permissive subject of bargaining, a question remains whether the Union waived its right to reject Respondent's proposal by submitting its own proposals and bargaining about this issue.

It is well settled that the definition of the appropriate unit is a permissive subject of bargaining. *Douds v. Longshoremen ILA (New York Shipping Assn.)*, 241 F.2d 278 (2d Cir. 1957); *Bozzuto's, Inc*., 277 NLRB 977 (1985). This means that either party may resist or engage in bargaining about the unit description as if it were a mandatory subject, without losing the right to refuse to include a proposal on that topic in the contract. *NLRB v. Davison*, 318 F.2d 550, 558 (4th Cir. 1963).

In accordance with these principles, the Union and the Respondent both were free to bargain about the scope of the unit. Neither party engaged in unlawful conduct by submitting and discussing proposals and counterproposals on this provision. What they could not do is bargain to impasse about their proposals. Therefore, bargaining and offering scope proposals did not oblige the Union to accede to the Company's proposal or risk waiver in rejecting it.

C. *Independent 8(a)(1) Allegations*

1. President Taylor threatens discharge

As mentioned above, an arbitration proceeding was held on June 21, 1991, to resolve employee Bill Linville's grievance that he was wrongfully denied a promotion to a first-tier receiver's position in accordance with the terms of the side bar letter to the parties' 1987–1990 collective-bargaining agreements. In support of Linville's claim, Jeff Feucht agreed to testify at the arbitration hiring that Jack Taylor hired him as a permanent, full-time ordering employee, not a vacation relief worker as the Respondent claimed.[20] Feucht stated that on the day before the arbitration hearing Jack Taylor asked him if he intended to testify in Linville's behalf. When Feucht replied affirmatively, Taylor told him he did not have to do so and added, ''Well, just remember where your checks come from each week and that [you are] the bottom man on the seniority list.'' (TR. 205.)

Feucht immediately complained to Drew Taylor about his father's remarks. With Feucht in tow, Drew went to his father, chastised him for his remarks and insisted that he apologize. Feucht thought that Drew apologized, but both Taylors recall that the apology came from Jack. Here, Taylor claimed in this proceeding that during their encounter he reminded Feucht he was hired as a vacation relief person.[21]

The Respondent does not deny that Taylor made the threat attributed to him, but in reliance on *Raysel-IDE, Inc*., 284 NLRB 879, 880–881 (1987); *Atlantic Forest Products*, 282 NLRB 855, 872 (1987); and *Agri-International*, 271 NLRB 926–927 (1984), suggests that since he apologized immediately and again at the hearing the next day, a remedial order is not required.

Respondent's reliance on the above cited cases is misplaced. In the first two matters, the Board found that employers were not liable for otherwise unlawful orders to employees to remove their union buttons, since the orders were quickly rescinded and thereafter, the employees wore union buttons without reprisal. An order to remove a union button, unaccompanied by any reference to a sanction, might be considered mildly intimidating, but it bears no resemblance to an ominous threat of discharge. Moreover, the effect of a threat from a company president cannot be dissipated in the same way that a supervisory order not to wear a union button can be rescinded and immediately rectified. *Agri-International* held that an employer effectively repudiated misconduct by supervisors who improperly interrogated employees, by promptly posting and mailing disavowal notices to all employees advising them of their Section 7 rights and pledging that such treatment would not recur. President Taylor's apology fell far short of the remedy in *Agri-International*; it could not dispel the coercion implicit in his remark. Accordingly, I find that Taylor's not-so-veiled threat to Feucht violated Section 8(a)(1) of the Act.

2. President Taylor's threat to sell warehouse was improper

On December 16, 1991, Union Steward Jack Steele submitted a grievance to Jack Taylor protesting the layoffs 4 days earlier of Jensen, Feucht, and Cole. According to Steele, Taylor said the grievance meant nothing since the Union could not arbitrate it. Later that same day, Steele lodged a protest with Taylor regarding the Company's hiring more distributors and taking away the unit employees' work. According to Steele, Taylor insisted that the work belonged to the distributors and threatened that if their status was not clarified in the contractual scope language, he and his brother had agreed they would sell the Sharon Road facility and phase-out the warehouse operations.[22]

[20] Under the terms of the side bar letter, if Taylor had employed Feucht as a full-time receiver, then the ratio of receivers to ordering employees would have qualified Linville to move up to the rank of receiver.

[21] Rejecting Jack Taylor's claim that he told Feucht he was hiring him as a vacation relief man, the arbitrator concluded that Taylor actually offered him a permanent full-time position, reasoning that Feucht would not have forfeited his current permanent position for a temporary one. To put it bluntly, the arbitrator found that Taylor deceived Feucht. However, he also found that Feucht was hired as a vacation relief person.

[22] See supra at 15 fn. 18.

Taylor offered an altogether different version of this encounter. He said that in response to a warning from Steele that Taylor Distributing should quit the Sharon Road facility, he pointed out that TW would suffer serious financial problems if TD left since it contributed to the rent, taxes, and utilities and also delivered a large part of the warehouse freight ''in a very efficient and effective manner.'' (TR. 1285.)

Taylor's account of his conversation with Steele was predictably benign. Unfortunately, I have difficulty crediting it. It is far more likely that Taylor made the statements which Steele attributed to him for he was not one to mince words or hesitate in speaking intemperately. Steele, on the other hand, testified in quite a restrained manner. Consequently, I am persuaded that Taylor did threaten to close the warehouse if the Union refused to accept the Company's scope proposal. Such conduct violates Section 8(a)(1) of the Act. See *Volk & Huxley*, 280 NLRB 219 (1986), enfd. 817 F.2d 996 (2d Cir. 1987); *National Micronetics*, 277 NLRB 993, 995 (1985).

3. Allegation of direct dealing

Alfred Southall testified that in November 1991, Jack Taylor showed him a copy of the Company's scope proposal, explaining that he had distributed copies to everyone else. Taylor told Southall that only one employee was preventing agreement and then asked if his wife had medical insurance. Southall said she did, adding that while it covered his wife and daughter who required costly treatments for sickle cell anemia, he was not included. He told Taylor that he would seek coverage under his wife's policy since the Central States Fund was about to cancel the employees' health plan coverage.

The Respondent submits that Taylor did nothing wrong in speaking with Southall, for Section 8(c) of the Act protects such communications. I agree.

Section 8(c) states, ''The expressing of any views, argument or opinion, or the dissemination thereof, whether in written, printed, graphic or visual form, shall not constitute or be evidence of an unfair labor practice . . . if such expression contains no threat of reprisal or force or promise of benefit.'' Pursuant to this provision, ''an employer has a fundamental right . . . to communicate with its employees concerning its position in collective bargaining negotiations and the course of these negotiations.'' *United Technologies Corp.*, 274 NLRB 1069, 1074 (1985). Taylor's remarks do not indicate that he was attempting to bargain directly with Southall or that he was inviting him to abandon the Union to obtain better terms from Respondent. Neither do they appear to threaten reprisal or promise a benefit. Therefore, the evidence is insufficient to sustain a finding of direct dealing. Accordingly, I shall recommend dismissal of this allegation.

CONCLUSIONS OF LAW

1. Taylor Warehouse Corporation is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Truck Drivers, Chauffeurs and Helpers, Local Union 100, affiliated with International Brotherhood of Teamsters, AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. Taylor Warehouse Corporation and Taylor Distributing Company constitute a single employer within the meaning of the Act.

4. Local Union 100 is the exclusive representative of employees in the following appropriate unit within the meaning of Section 9(a) and (b) of the Act:

> A. All receiving employees of Respondent engaged in handling, loading or unloading of warehouse freight or warehouse merchandise on the docks or premises of Respondent excluding Taylor Ordering employees, office employees, watch, engineers, carpenters and supervisors within the meaning of the Act.
>
> B. All ordering and general warehouse employees of Respondent engaged in handling, loading or unloading of warehouse freight or warehouse merchandise on the docks or premises of Respondent, except office employees, watchmen, receiving employees, engineers, carpenters and supervisors within the meaning of the Act.

5. By insisting to impasse on altering ''Article I. Scope and Coverage of Agreement,'' as a condition of reaching agreement on the terms of a collective-bargaining agreement, and by unilaterally changing terms and conditions of employment of bargaining unit members without obtaining the Union's consent or bargaining in good faith with the Union concerning such changes, Respondent has violated Section 8(a)(1) and (5) of the Act.

6. By unilaterally transferring or diverting bargaining unit work to Taylor Distributing Company employees to retaliate against union members for filing a complaint with the U.S. Occupational Health and Safety Commission, Respondent violated Section 8(a)(1) and (3) of the Act.

7. By laying off bargaining unit employees Kevin Cole, Jeffrey Feucht, and Robert Wesley Jensen as a result of the unlawful diversion of bargaining unit work to the employees of Taylor Distributing Company, Respondent violated Section 8(a)(1), (3), and (5) of the Act.

8. By threatening Jeffrey Feucht with job dismissal if he testified against the Company's interests at an arbitration proceeding, and by threatening to sell the Sharon Road warehouse if the Union failed to accept the Company's contractual scope proposal Respondent Taylor Warehouse, through its president, Jack Taylor, violated Section 8(a)(1) of the Act.

9. The Respondent did not violate the Act by distributing copies of its collective-bargaining proposal to its employees.

THE REMEDY

Having found that Respondent engaged in unfair labor practices in violation of Section 8(a)(1), (3), and (5) of the Act, I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

As found above, Respondent violated Section 8(a)(1), (3), and (5) by failing to bargain in good faith and by unilaterally changing the employees' terms and conditions of employment. Accordingly, Respondent shall be ordered to revoke the unilateral termination of pool assignments which occurred after July 28, 1991, and restore such work to the bargaining unit employees. Respondent also shall be ordered to bargain in good faith by ceasing to condition its acceptance

of a collective-bargaining agreement on the Union's consenting to an amendment of the scope provision.

In addition, Respondent shall be ordered to reinstate Kevin Cole to his former or substantially similar position and make Cole, Jeffrey Feucht, and Robert Wesley Jensen whole for any loss of wages or other benefits they may have sustained as a result of the Respondent's unilateral diversion of bargaining unit work. Such backpay shall be computed with interest as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as computed in *New Horizons For the Retarded*, 283 NLRB 1173 (1987).

Lastly, I shall recommend that Respondent post the notice set forth in the appendix attached to this decision which shall include a commitment to cease and desist from any like or related acts found here to constitute unfair labor practices. The allegation that Respondent violated the Act by dealing directly with employees shall be dismissed.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[23]

ORDER

The Respondent, Taylor Warehouse Corporation, Cincinnati, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain in good faith with Truck Drivers, Chauffeurs and Helpers Local 100 as the exclusive bargaining representative of its employees in the appropriate unit described as follows:

> A. All receiving employees of Respondent engaged in handling, loading or unloading of warehouse freight or warehouse merchandise on the docks or premises of Respondent excluding Taylor Ordering employees, office employees, watch, engineers, carpenters and supervisors within the meaning of the Act.
>
> B. All ordering and general warehouse employees of Respondent engaged in handling, loading or unloading of warehouse freight or warehouse merchandise on the docks or premises of Respondent, except office employees, watchmen, receiving employees, engineers, carpenters and supervisors within the meaning of the Act.

(b) Unilaterally changing terms and conditions of employment of bargaining unit employees or diverting work from such employees to employees of Taylor Distributing Company or to any other of its facilities, without obtaining the consent of or bargaining in good faith with the Union.

(c) Laying off or discharging bargaining unit employees as a result of unlawfully transferring or diverting bargaining unit work.

(d) Threatening to close the Sharon Road facility in order to coerce the Union into accepting a proposal to modify the collective-bargaining agreement and threatening employees with discharge in order to restrain them from testifying at arbitration hearings.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer Kevin Cole full and immediate reinstatement to his former or substantially equivalent position, without prejudice to his seniority or other rights he previously may have enjoyed, and make Cole, Jeffrey Feucht, and Robert Wesley Jensen whole for any loss of pay or benefits they may have sustained as a result of their unlawful layoffs in the manner described above in the remedy section of this decision.

(b) Bargain in good faith with Truck Drivers, Chauffeurs and Helpers Local Union 100, as the exclusive bargaining agent of employees in the above described appropriate unit, and execute in writing, any agreement which may be reached.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its Sharon Road facility in Cincinnati, Ohio, copies of the attached notice marked ''Appendix.''[24] Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees customarily are posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

(f) The complaint allegation concerning Respondent's dealing directly with employees shall be dismissed.

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[23] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[24] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''